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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-952

EDDIE C. THOMAS,

Petitioner,

vs.

REVIEW BOARD OF THE INDIANA EMPLOYMENT SECURITY DIVISION,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF OF JEWISH PEACE FELLOWSHIP AND FELLOWSHIP OF RECONCILIATION, AMICI CURIAE

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The above named organizations respectfully move this Court, pursuant to Rule 42 of its Rules, for leave to file the accompanying brief amici curiae in support of the Petitioner herein.

The consent of the parties to the filing of the attached brief has been sought by the moving parties. However, while the petitioner gave his consent, the respondent Review Board of the Indiana Employment Security Division

refused such consent. Amici, accordingly, proceed by this motion.

The amici are religious organizations of Jews and Christians, whose commitment of faith preclude participation in any war and in the production of weapons of war. They share the view of the petitioner herein that denial of unemployment compensation benefits to him by reason of his refusal to participate as an employee in the production of weapons of war violates the Constitution of the United States, particularly the First Amendment, in respect to both the Free Exercise and Establishment Clauses. They believe that the Supreme Court of Indiana was in error in reversing the determination of the Indiana Court of Appeals that denial of unemployment benefits to petitioner would violate the Constitution of the United States.

Accordingly, the amici support the position of the petitioner and move that the Court accept and consider the accompanying brief amici curiae, which describes and develops the bases and reasons for that support.

Respectfully submitted,

Leo Pfeffer
Attorney for Amici Curiae

March, 1980

TABLE OF CONTENTS

	PAGE
Interest of the Amici	1
Statement of the Case	2
Question to Which This Brief Is Addressed	2
Summary of Argument	3
Argument	
Disqualification from unemployment insurance benefits of one who for reasons of conscience will not work producing weapons for war unconstitutionally deprives him of his freedom of religion and violates the Establishment Clause	4
Conclusion	11

TABLE OF AUTHORITIES

PAGE

Cases:

Abington School District v. Schempp, 374 U.S. 203 (1963) 8
Arver v. United States, 245 U.S. 366 (1918) 6

Everson v. Board of Education, 330 U.S. 1 (1947) 10

Lemon v. Kurtzman, 403 U.S. 602 (1971) 10
Lincoln v. True, 408 F. Supp. 22 (W.D., Ky., 1975) 4, 5

Selective Draft Law Cases, 245 U.S. 366 (1918) 6
Sherbert v. Verner, 374 U.S. 398 (1963) 4, 5, 8

Wisconsin v. Yoder, 406 U.S. 205 (1972) 8

Other Authorities:

E. Fleet, *Madison's Detached Memoranda,* William and Mary Quarterly, October 1946 8

L. Pfeffer, *Freedom and/or Separation: The Constitutional Dilemma of the First Amendment,* 64 Minn. L. Rev. 201 (1980) 8

A.P. Stokes, *Church and States in the United States,* vol. 1, pp. 755-756 (1950) 7

Universal Military Training Service Act, 50 U.S.C. App. Section 456(j) 7

Williams, Roger, *The Bloudy Tenet of Persecution for cause of Conscience, discussed in a Conference between Truth and Peace* 6

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Interest of the Amici

The interest of the amici curiae is set forth in the foregoing motion for leave to file this brief and need not be repeated here.

Statement of the Case

The facts of this case, as determined by the referee and affirmed by the Employment Security Review Board (hereinafter, the Board) establish that petitioner, member of the Jehovah's Witnesses sect, left his employment at the plant of the Blaw-Knox Foundry and Machinery Company because it was engaged primarily in the manufacture of weapons. The Board nevertheless denied his claim for unemployment compensation on the ground that he voluntarily terminated his employment and that the fact that his action was impelled by his religious convictions was immaterial under the state's unemployment compensation law.

The Court of Appeals of Indiana set aside the action of the Board and directed it to enter an award in favor of petitioner. On appeal, however, a majority of the state's Supreme Court reversed the decision and ruled that the challenged ruling of the Board did not violate the Free Exercise Clause of the First Amendment, but on the contrary, an award of benefits would violate the Establishment Clause.

Question to Which This Brief Is Addressed

This brief is addressed to the question whether a state is constitutionally permitted or constitutionally mandated to deny unemployment compensation benefits by reason of a complainant's adherence to his religious conscience which forbids participation in the manufacture of weapons of war.

Summary of Argument

A statute which is construed to disqualify from unemployment insurance benefits one who because of his religious convictions will not engage in the manufacture of arms deprives him of free exercise of his religion. If the deprivation be deemed indirect, it is nevertheless within the compass of the First Amendment. It is constitutionally permissible only if clearly and immediately necessary for the avoidance of a grave danger to the national security and only if no method not infringing upon religious liberty is available to avoid the danger. This test cannot be met in the preesnt case, and accordingly the disqualification of the plaintiff unconstitutionally deprived him of rights secured by the First Amendment.

Moreover, non-disqualification of such a worker not only does not violate the Establishment Clause of the Amendment but, on the contrary, is mandated by it, since its principal and primary effect is to inhibit the religion to which the petitioner herein is committed.

ARGUMENT

Disqualification from unemployment insurance benefits of one who for reasons of conscience will not work producing weapons for war unconstitutionally deprives him of his freedom of religion and violates the Establilshment Clause.

Initially we note the assertion of the Indiana Supreme Court that the legislature intended to impose and did impose a stricter standard of eligibility for unemployment insurance benefits in respect to those who quit work than applicable to those who are unemployed and refuse available work. 391 N.E. 2d 1127 at 1130. This construction of the state's legislative intent is, of course, binding upon this Court. We suggest, however, that this difference in legislative intentions does not rise to constitutional standards.

This is what was held in *Lincoln* v. *True,* 408 F. Supp. 22 (W. D., Ky., 1975). There the claimant voluntarily terminated her employment of 21 years with a tobacco company because the elders of the Jehovah's Witnesses, the creed professed by Thomas in the present case, informed her that anyone using or working with tobacco was violating the Will of God and unless she resigned she would be expelled from the fellowship of Jehovah's Witnesses. The District Court cited *Sherbert* v. *Verner,* 374 U.S. 398 (1963) as controlling and held that the denial of benefits violated the claimant's right to the free exercise of her religion and ordered benefits to be paid.

The court below in the present case recognized that *Lincoln* v. *True* was indistinguishable from the present case, since it too involved not an applicant for employment but an employee who was discharged. It ruled, however, that the case was incorrectly decided and refused to follow it.

We agree that *Lincoln* v. *True* is indistinguishable from the present case, but we disagree with its conclusion that it was incorrectly decided. We believe the disposition in *Lincoln* was impelled by the decision in *Sherbert,* and that both were mandated by the Free Exercise Clause.

Although *Sherbert* v. *Verner,* 374 U.S. 398 (1963) involved a Seventh-Day Adventist who refused to accept tendered offers of employment because they would require her to work on her Sabbath, nothing in the Court's opinion indicates that there is any constitutional difference between that situation and the one before this Court in the present case. Indeed, *Sherbert* is analogous to the present case in that there the claimant lost her employment when the company changed from a five to six day workweek, requiring Saturday work, and in the present case Thomas was transferred from the roll foundry, which he believed was not involved in arms production, to the turret line, which patently was.

Freedom of religion, of course, is not absolute; no freedom secured by the First Amendment is. Nevertheless, First Amendment rights have over many years been accorded a preferred position in our constitutional scheme of things. While the right to abstain from participation in military service is undoubtedly within the purview of the Freedom of Religion Clause, it is, like all other First

Amendment rights, subject to abridgment where necessary for the defense of the nation. *Selective Draft Law Cases* (*Arver* v. *United States*), 245 U.S. 366 (1918). But, we submit, the determination whether that precious freedom should be abridged in the interest of national safety is a decision which should be made by the nation, acting through its legislature, rather than by individual states, acting through their legislatures or courts.

The assertion by the Indiana Supreme Court that according conscientious objector status to Thomas under the Free Exercise Clause would present a conflict between that Clause and the Establishment Clause, is not new. Exactly the same claim was asserted in the *Selective Draft Law Cases* in 1918. There the Court, in referring to a provision in the law that exempted from military service religious sects "whose tenets excluded the moral right to engage in war," said:

> . . . And we pass without anything but statement the proposition that an establishment of religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clauses of the act to which we at the outset referred, because we think its unsoundness is too apparent to require us to do more. 245 U.S. at 389-390.

Exemption from military service of persons whose religious conscience forbids participation therein, has a long and honorable history. It goes back to the early days of the colony of Rhode Island and to Roger Williams, whose pamphlet, "*The Bloudy Tenet of Persecution for cause of Conscience, discussed in a Conference between Truth and Peace,*" has long been recognized as an epochal milestone

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in our history not only of religious freedom but also the separation of church and state. More than a century before we became an independent nation, Rhode Island, in 1673, exempted from military service persons who had religious scruples against participation in war. A.P. Stokes, *Church and States in the United States,* vol. 1, pp. 755-756 (1950).

This practical understanding of the meaning of religious freedom and church-state separation has become the law of the land. From the earliest days our nation has accorded exemption from military services to persons whose religious conscience forbade participation in them, a mandate now codified in the Universal Military Training Service Act, 50 U.S.C. App. Section 456 (j). This section of the statute relates to active participation in armed conflict, obviously a more serious concern of national security than what is involved in the present case—civil employment in a plant that manufactures armaments.

The Indiana Supreme Court in the present case found itself faced with a dilemma arising out of "the conflict between the Free Exercise Clause under the First Amendment and the Establishment Clause of the First Amendment."

> . . . To hold [the Court said] that an employee who voluntarily quits work for personal reasons and personal beliefs which can somehow be described as religious beliefs, must be allowed benefits which other employees who voluntarily quit work for valid personal reasons or beliefs, which are not "religious" are denied benefits, would violate the Establishment Clause. 391 N.E. 2d at 1134.

Faced with this conflict, the Indiana Supreme Court opted in favor of no-establishment over free exercise. This

is somewhat surprising; constitutional authorities and dicta (there are no holdings directly in point) of this Court seem to indicate a contrary choice. See *Wisconsin* v. *Yoder,* 406 U.S. 205, 220-221 (1972); *Abington School District* v. *Schempp,* 374 U.S. 203, 296-299 (1963) (Brennan, J., concurring); L. Pfeffer, *Freedom and/or Separation: The Constitutional Dilemma of the First Amendment,* 64 Minn. L. Rev. 201 (1980).

The conflict, we suggest, is more apparent than real. It was asserted in *Sherbert* and there rejected by the Court. "In holding as we do," the Court said, "plainly we are not fostering the 'establishment' of the Seventh-Day Adventist religion in South Carolina, for the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religions with secular institutions which it is the object of the Establishment Clause to forestall." 374 U.S. at 409.

Exemption from military service of religious conscientious objectors is not the only instance of constitutional acceptability under the Free Exercise Clause of a practice seemingly inconsistent with the Establishment Clause. Use of tax-raised funds to pay for chaplains in the armed forces would appear to be violative of the Establishment Clause. James Madison, the father not only of the Constitution but also of the First Amendment, expressed that view in his *Detached Memoranda* (E. Fleet, *Madison's Detached Memoranda,* William and Mary Quarterly, October 1946). Madison, however, recognized at least a possible exception in the case of navies with insulated crews, who, as a prac-

tical matter, could not exercise that right to the free exercise of religion by going to a church or other house of worship. Today, soldiers serving away from their home towns are practically as "insulated" as navies, and it is because of this insulation that chaplains in the armed forces can be justified under the First Amendment's guaranty of religious freedom even though seemingly inconsistent with the Establishment Clause.

Indeed, it is possible to suggest even further that chaplains in the armed forces are not merely permissible under the Establishment Clause but are in fact mandated by the Free Exercise Clause. A soldier drafted into the armed forces and sent to camp far from home is deprived of his opportunity to visit his church or synagogue. To the extent that such deprivation is necessary to the over-riding consideration of national defense, it is constitutionally allowable. But it is constitutional only to the extent that it is necessary; and if the government can furnish a substitute in the form of a traveling church or chaplain, the soldier may have a Free Exercise right thereto notwithstanding the Establishment Clause.

The underlying premise of this proposition is that the free exercise of religion is the most precious of American liberties. Indeed, the history of the First Amendment establishes that it is the one that was most vigorously fought for and first achieved. Out of that freedom later came freedom of speech and of the press and of assembly and petition.

It is because of this that, as we have noted, our government has from the earliest time of its existence exempted

from compulsory military service persons whose religious conscience forbade them to bear arms. That exemption was a complete one; it encompassed a prohibition of imposing penalties, political or economic, upon those whose religious conscience forbade them to engage in armed conflict. Who can doubt the unconstitutionality of a law that sought to deprive conscientious objectors of the right to vote, not merely in national but even in state elections?

The same reasoning is applicable in the present case. Denying the petitioner herein the benefit of the unemployment compensation law realistically constitutes a penalization for adhering to his religious conscience. This, we submit, cannot be reconciled with the letter or spirit of the Free Exercise Clause.

We argue, however, even further than this. We submit that such denial violates also the Establishment Clause. Under that Clause, as it has been interpreted in *Everson* v. *Board of Education,* 330 U.S. 1 at 15 (1947), government, state or federal, is forbidden to punish any person for "entertaining or professing religious beliefs, for church attendance or non-attendance." As expressed in later cases, the test of constitutionality under the Establishment Clause mandates that the principal or primary effect of a law "must be one that neither advances *nor inhibits* religion." *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971) (emphasis added).

We respectfully urge that a law which denies a person benefits under an unemployment compensation law because of his religious conscience is one which "inhibits religion" and thus violates the Establishment Clause.

Conclusion

For the reasons set forth herein it is submitted that the Indiana statute as interpreted and applied herein violates both the Free Exercise and Establishment Clauses of the First Amendment and that the decision of the Indiana Supreme Court should therefore be reversed.

Respectfully submitted,

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